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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

AMERICAN FOREIGN SERVICE ASSOCIATION, *et al.*,
Appellants,

v.

STEVEN GARFINKEL, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICI CURIAE THE GOVERNMENT ACCOUNTABILITY PROJECT AND THE FUND FOR CONSTITUTIONAL GOVERNMENT IN SUPPORT OF APPELLANTS

Joseph B. Kennedy
(Counsel of Record)
Thomas M. Devine
Donald G. Aplin
Government Accountability Project
25 E Street, Suite 700
Washington, D.C. 20001
(202) 347-0460

And on Behalf of
Fund for Constitutional Government
121 Constitution Avenue, N.E.
Washington, D.C. 20002

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BRIEF OF AMICI CURIAE THE GOVERNMENT ACCOUNTABILITY PROJECT AND THE FUND FOR CONSTITUTIONAL GOVERNMENT IN SUPPORT OF APPELLANTS

INTEREST OF AMICI

The Government Accountability Project (GAP) is a non-profit, non-partisan, public interest group formed in 1975 to help restore and maintain confidence in the federal system by making public officials accountable for their activities. In pursuit of these goals, GAP works to broaden public understanding of the role of the federal employee in preventing government waste, fraud, and abuse of authority.

GAP is especially concerned with civil servants who suffer retaliation for having spoken out about government wrongdoing. Through public education, legislative efforts and selective legal action, GAP strives to protect the First Amendment right of all federal employees to offer reasonable criticism without fear of retribution.

To further these goals GAP offers assistance to the courts in cases concerning the remedies available to federal employees under the Constitution, laws and treaties of the United States. GAP has filed several Amicus Curiae briefs before this and other federal courts. *See, e.g., Givhan v. Western Line Consolidated School District,* 439 U.S. 410 (1979); *Nixon v. Fitzgerald,* 457 U.S. 731 (1982); *Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Spagnola v. Mathis,* 859 F.2d 223 (D.C. Cir. 1988); *Frazier v. M.S.P.B.,* 672 F.2d 150 (D.C. Cir. 1982); *Martin v. Lauer,* 686 F.2d 24 (D.C. Cir. 1982); *Brown & Root v. Donovan,* 747 F.2d 1029 (5th Cir. 1984); *Kansas Gas and Electric Company v. Brock,* 780 F.2d 1505 (10th cir. 1985).

GAP has particularly concentrated on monitoring the implementation of the "whistleblower" protections of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. Sections 2301, 2302 and 7701. *See e.g.,* Devine and Aplin, *Abuse of Authority: The Office of the Special Counsel and Whistleblower Protection,* 4 Antioch Law Journal 5 (Summer 1986); Devine and Aplin, *Whistleblower Protection — The Gap between the Law and Reality,* 31 Howard Law Journal 2 (1988). Since 1980 GAP has testified regularly in annual congressional oversight hearings on implementation of "whistleblower" protections in the CSRA and advocated stronger protections for federal employees through the Whistleblower Protection Act of 1988, S. 508, 100th Cong. 2d Sess.

GAP continues to represent clients in the former companion cases to this action, *National Federation of Federal Employees*

v. U.S. and *American Federation of Government Employees, et al. v. Steven Garfinkel*, currently on appeal at the D.C. Circuit Court of Appeals (Nos. 88-5402, 88-5404).

The Fund for Constitutional Government (FCG) is a nonprofit public charity dedicated to fostering constitutional responsibility in the conduct of elected and appointed officials.

Representatives of FCG testified before Congress on the Civil Service Reform Act before its adoption. FCG has also testified at congressional oversight hearings on implementation of the CSRA. FCG and GAP joined in an a *amicus curiae* brief to this court in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979).

Amici's efforts on behalf of federal "whistleblowers" are made in furtherance of the belief that professional and dedicated civil servants who are free to exercise their First Amendment rights are essential to an effective and responsible democracy.

SUMMARY OF ARGUMENT

Recent breakdowns in government accountability have intensified the longstanding congressional commitment to challenge secret government through strengthened protection for whistleblowers — those employees who disclose government illegality or other significant misconduct. In theory and in fact, their disclosures have proven to be the unique, invaluable lifeblood for effective congressional oversight of Executive Branch activity. Congress has recognized the necessity of maintaining a free flow of information from whistleblowers since its 1912 passage of the Lloyd-Lafollette Act, 5 U.S.C. Section 7211, outlawing a "gag rule" strikingly similar to the nondisclosure agreements for which Section 630 cut off funding. There has been a consistent, bipartisan reaffirmation of the

Lloyd-Lafollette Act anti-gag principles, highlighted by whistleblower protections in the Civil Service Reform Act of 1978 and the Whistleblower Protection Act of 1988. The legislative history of the latter bill echoed the appropriations restrictions in Section 630 against nondisclosure agreements.

The District Court's decision purports to reject the constitutionality of a law claimed to create unprecedented restrictions on the President's duty to protect sensitive information. That premise is inaccurate. Section 630 merely incorporates the provisions of fundamental parent statutes representing the law of free communication established by Congress over the last 75 years, including the Civil Service Reform Act of 1978. By invalidating Section 630, the District Court inadvertently reversed this Court's doctrine of deferring to Congress as the proper branch to establish the remedies for national security violations.

The District Court's claim for the Executive of a plenary authority and responsibility to protect sensitive government information reveals a serious misunderstanding of the doctrine of separation of powers. History teaches that the original intent of the Framers was that the doctrine of separation contemplated a system of separate branches with shared, not mutually exclusive, powers. *Federalist*, ed. Jacob E. Cooke (1961), Nos. 47-48, especially at p. 332. As Professor Levy has noted:

> If much contemporary constitutional law is about rights, the reason is that as government gets larger, more complex, more powerful, and more intrusive, the need to stay Caesar's hand increases. If government exists to protect the individual, as the preamble of the Declaration of Independence suggests, and as the provisions of the Constitution suggest as strongly, then the Court must fortify our rights

> . . . The burden of proof should always be on the government to show that rights claimed must be denied lest legitimate ends go unfulfilled because no alternative means are possible and the needs of the government are compelling.

Original Intent and the Framers' Constitution, Levy (1988), p. 392. The District Court's application of a "minimal scrutiny" standard, 688 F. Supp. at 686-87, failed to include in the matrix of policy considerations the authority and responsibility Congress shares with the Executive for balancing the protection of the nation's secrets against the public's right to know and the individual's right to freedom of expression and communication. If the decision below is upheld, the well-developed body of statutory law protecting freedom of information will be jeopardized.

Significantly, prior to this litigation appellees had strenuously sought to reassure Congress that the Executive's non-disclosure agreements would not supersede the civil service laws that protect disclosures of mismanagement and malfeasance.

The decision below also casts a constitutional shadow over at least 12 other anti-fraud or environmental whistleblower protection statutes whose broad mandates do not recognize the District Court's limitation on the power of Congress to regulate the flow of information involving public health and safety.

In the absence of congressional authority to outlaw the use of nondisclosure agreements to foreclose the flow of such information the activity protected by these statutes will be effectively neutralized. In the case of the whistleblower provision of the Civil Service Reform Act, the nondisclosure agreements are tantamount to administrative repeal of the statutory boundary for protected conduct.

In all cases the statutes would be emasculated by the chilling effect of a pre-clearance requirement for almost any unmarked or unclassified information a conscientious employee seeks to disclose. The only way an employee can be certain of compliance with the Executive's nondisclosure agreements is to ask his or her boss whether the unmarked information is classified. That would automatically eliminate any prospect of making a confidential whistleblower disclosure and chill, if not freeze, the flow of information vital to informed congressional and public oversight of waste, fraud, abuse or mismanagement.

The prior review and authorization requirement would institutionalize an advance warning alert for targets of disclosures involving official wrongdoing. At a minimum, the targeted individual or agency could compromise the integrity of an investigation by actions such as occurred in the Iran-Contra case.

An unforseen consequence of the decision below may be reinstatement of jurisdiction over constitutional tort suits. That could occur if the *Bush v. Lucas*, 462 U.S. 388 (1983) doctrine of deference to statutorily-created administrative remedies for whistleblowers is preempted by the separation of powers doctrine. The vitality of the *Bush* doctrine depends upon effective alternate remedies for whistleblowers under the CSRA.

ARGUMENT

I. WHISTLEBLOWERS ARE ESSENTIAL TO THE FORMATION OF PUBLIC POLICY.

A primary lesson of the 1980's is the threat our nation faces from secret government. The tragedy of the Challenger disaster, the disillusionment of long-term, widespread Pentagon

procurement fraud and the lawlessness of the Iran-Contra scandal might all have been prevented if federal civil servants were confident they had the freedom to "commit the truth." The defense procurement scandal festered, as Senator Grassley observed, until it was exposed by a former federal employee. 134 Cong. Rec. S15336 (daily ed. Oct. 7, 1988). This year Congress demonstrated a major commitment to strengthen freedom to expose wrongdoing in the Executive Branch by unanimously passing the Whistleblower Protection Act of 1988, *id.* at S15328 (subsequently pocket-vetoed); the Major Fraud Act of 1988, 134 Cong. Rec. H10637 (daily ed. Oct. 20, 1988) and the Military Whistleblower Protection Act. Pub. L. No. 100-456, section 846, 100th Cong., 2d Sess. (1988).

The accelerating congressional mandate to improve protections for "whistleblowers" — defined under civil service law at 5 U.S.C. section 2302(b)(8) as those employees who disclose violatios of law, abuse of authority, mismanagement, gross waste or substantial and specific danger to public health or safety — is grounded in sound public policy. Government experts who are free to testify truthfully at public fora are essential tools of government accountabiliy.

In practice, whistleblowers have been the Achilles heel of secret government. When not muzzled, they have exposed quality control breakdowns in production of military equipment upon which our troops' lives depend; multi-billion dollar cost overruns for the C5-A transport and other military purchases such as the world's most expensive coffee pots, nuts, bolts, armrests and toilet seats; a life-threatening breakdown in federal inspection of meat sold to the public and the military; public health threats from unsafe nuclear power and weapons plants; national security threats from security breakdowns at nuclear weapons sites; and similar public policy debacles in-

volving information whose exposure would have been barred by nondisclosure agreements such as Standard Form (SF) 189. *See generally The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Government Waste, Abuse and Corruption Prepared for the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. (1978) ("Leahy Report"); *Classified Information Nondisclosure Agreements: Hearings before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service*, 100th Cong., 1st Sess. 1987 ("1987 Hearings").

Since passage of the Lloyd-Lafollette Act in 1912 Congress has recognized the indispensable necessity of maintaining a free flow of information from Executive Branch employees. 5 U.S.C. section 7211. That statute passed in response to a "gag rule" issued by President Taft, forbade federal employees from communicating with Congress, except through and with the consent of department heads. This restraint on expression was strikingly similar to SF 189. Executive Order #1142 of November 26, 1909, *reprinted in* 48 Cong. Rec. 5223 (1912).

Twenty seven years later Congress again emphasized its reliance on a free flow of information from the Executive to the Legislative branches when it enacted the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 STAT. 111 (codified as amended in scattered sections of 5 U.S.C.). The foundation for CSRA statutory whistleblower protections, the Leahy Report, explained:

> Federal employees are often the source of information about agency operations suppressed by their superiors. Since they are much closer to the actual working conditions than top agency officials, they have testified before Congress, spoken to reporters, and informed the public. Mid-level employees pro-

> vide much of the information Congress needs to evaluate programs, budgets, and overall agency performance.

Leahy Report, *supra*, at 40. *See also* HR Rep. No. 95-1403, at 386-87 (1978). As emphasized in the CSRA legislative history, "Protecting employees who disclose government illegality, waste and corruption is a major step toward a more effective civil service. In the vast federal bureaucracy, it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth." S. Rep. No. 95-969, at 8 (1978). In reviewing the CSRA legisltive history, this Court observed in *Bush v. Lucas*, "There is a remarkable similarity between comments made in Congress in 1912, when the Lloyd-Lafollette Act was passed, and in 1978 when the Civil Service Reform Act was enacted." 462 U.S. at n.37.

If there was any doubt about the congressional premise that nondisclosure agreements are incompatible with civil service law, it was dispelled in the Joint Explanatory Statement for the Whistleblower Protection Act of 1988:

> It is obvious, but worth noting, that no Executive order, regulation or contract can extinguish the rights provided under section 2302 of title 5. Employees have been required to sign security agreements as a condition for gaining access to classified information which seem to suggest that the signers of such agreements could be punished for disclosures protected by 5 U.S.C. 2302(b)(8). Insofar as these agreements seem to limit the ability of whistleblowers to exercise rights provided under Chapters 12 and 23 of title 5, the security agreements are not valid.

134 Cong. Rec. H9322 (daily ed. Oct. 3, 1988).

II. THE DECISION BELOW CASTS A CONSTITUTIONAL CLOUD OVER THE BODY OF STATUTORY LAW PROTECTING FREEDOM TO DISCLOSE MISMANAGEMENT AND MALFEASANCE.

The significance of this case goes far beyond the appropriations rider that section 630 represents. If the decision below is upheld and its holdings applied in other contexts, it may seriously undermine the Constitutional and statutory protections accorded federal employees' communications with Congress that have evolved over the last 75 years.

Congress clearly intended Section 630 as an interim measure against vague overinclusive nondisclosure agreements. As Representative Brooks explained on the House floor prior to its passage,

> Needless to say, the administration's use of these secrecy pledges, represents a sharp attack on free speech under the first amendment and the whistleblower protections of various civil service laws. It is imperative, therefore, that Congress review this policy and legislate adjustments to preserve a proper balance between national security considerations and free speech in our Republic.

133 Cong. Rec. H11999 (daily ed. Dec. 21, 1987).

Prior to this litigation, appellee Garfinkel did not dispute the supremacy of statutory protections in conflict with the nondisclosure agreements. To the contrary, in congressional testimony he attempted to reassure Congress that SF 189 did not supersede the CSRA whistleblower provision, 1987 Hearings, *supra*, at 81, a policy he subsequently formalized. 53 Fed. Reg. at 38,279 (32 C.F.R. section 2003.20 (g)).

Congress took appellee Garfinkel at his word by specifically implementing through Section 630 his generalized principles.

The District Court swept this delicate compromise aside. Ironically, the provisions which the District Court found most constitutionally objectionable are those drawn directly from the Lloyd-Lafollette Act and the CSRA whistleblower shield, 5 U.S.C. section 2302(b)(8). If upheld, the decision below may cast a chilling shadow over the constitutionality of numerous others.

The provisions that the district court found to be "[p]articularly offensive" are subsections (3) through (5) of section 630." 688 F. Supp. at *685*. Subsections (3) and (4), however, restate the statutory protection for communicating with Congess in place since 1912 under the Lloyd-Lafollette Act. 5 U.S.C. section 7211. Subsection 5 merely paraphrases the boundary for unrestricted disclosures under the CSRA whistleblower provision — protection of significant dissent unless the disclosure is specifically prohibited by statute or executive order.[1]

The decision below casts a shadow over other statutes whose broad protections do not recognize the District Court's mandate of absolute discretion for the Executive Branch to restrict the flow of sensitive information. To illustrate, the False Claims Reform Act of 1986 has a whistleblower protection clause for those who act "in furtherance of" investigations and litigation that seek to recover fraudulent payments. 31 U.S.C. section 3730. The Major Fraud Act of 1988 has a similar provision. 18 U.S.C. 1031 (g).[2]

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[1]The Military Whistleblower Protection Act, *supra*, adopts the same boundary for protected disclosures and reaffirms Congress' right to receive information even from service members.

[2]Similar uncertainty would pervade the status of ten environmental whistleblower provisions administered through the Department of Labor to protect those who assist in enforcing corresponding organic statutes. These endangered statutes include the Clean Air Act, 42 U.S.C. section 7622; Energy Reorganization Act, 42 U.S.C. section 5851; Occupational

SF 189 particularly impinges upon the narrower disclosure channel in the CSRA for classified information. Under the CSRA, an employee has an unqualified right to make disclosures of classified information to an agency Inspector General or the Office of the Special Counsel of the Merit Systems Protection Board. The nondisclosure agreements prohibited by Section 630 ignore this statutory channel for national security whistleblowers. Under SF 189 the employee first must submit the information for prior review and authorization, only after the employee's agency agrees the Inspector General or Special Counsel has a "need to know" may a confidential or classified disclosure be made. The same is true of proposed disclosures to Congress.

In evaluating the propriety of SF 189, the American Law Division of the Library of Congress put this issue in perspective.

> In a practical sense, to the extent that the secrecy agreement because of its apparent breadth and vagueness of terms chills or discourages the disclosure of any information which evidences waste, fraud, corruption or illegality in government, that effect or result would be in contrast to and in derogation of the intended result of the whistleblowing statute.

Memorandum to Honorable Charles Grassley from the American Law Division, Congressional Research Service, Library of Congress, at 7 (July 28, 1987).

Safety and Health Act, 29 U.S.C. section 660(c); Safe Containers for International Cargo Act, 46 U.S.C. section 1506; Safe Drinking Water Act, 42 U.S.C. section 300-j-9; Solid Waste Disposal Act, 42 U.S.C. section 6971; Superfund Act, 42 U.S.C. section 9610; Surface Mining Control and Reclamation Act, 29 U.S.C. section 1293; Surface Transportation Act, 49 U.S.C. section 2305; and Water Pollution Control Act, 33 U.S.C. section 1367.

That is precisely the impact the nondisclosure agreements will have if the decision below is upheld. The almost limitless scope of information that is classifiable, combined with the lack of any required notice of its status, means that virtually any information can be suppressed. *Legislation Needed to Curb Secrecy Agreements: Report by the House Comm. on Gov. Ops.*, 100th Cong., 2d Sess. 9-10 (1988) ("Secrecy Report").

The prior authorization requirement of the nondisclosure agreements precludes Congress' ability to protect confidential communications. The House Government Operations Committee explained,

> Without the classification markings on unclassified information, however, an employee cannot be sure that the nondisclosure agreements' restrictions apply to that material. Consequently, they must check with their superiors, alerting them to the disclosure. This invites a chilling effect. As Congresswoman Boxer noted at the [committee's prior] hearings , "I am concerned that this will force would-be whitleblowers to have to ask their superiors about classification determinations. This will stop them."

Id., at 10 n.35. As the legislative history of the CSRA noted, "Protection of the complainant's identity is essential not only to prevent retaliation against the employee, but to assure a free flow of information to the Special Counsel." S. Rep. 95-969, at 33 (1978).

Congress' inability to prohibit the prior authorization requirement means agencies will have a total veto power over disclosures. We recognize the need to discourage irresponsible leaks, but the deterrent adopted by the Executive exceeds the need for administrative control. Congress is best suited to draw this line. As Senator Grassley explained in the Secrecy Report, *supra* at 10 n.36, "If the employee is not certain if

information might some day be classified, he or she must ask a supervisor. As a result, the potential whistleblower would be identified, and the supervisor could block disclosure of the information, even if it was not classified and had never been intended to be classified, but was simply embarrassing to the Administration."

The net effect of invalidating Section 630 is to strip Congess of the ability to defend its statutory free speech protections.

III. AN UNFORSEEN CONSEQUENCE OF THE DECISION BELOW MAY REINSTATE JURISDICTION FOR CONSTITUTIONAL TORT SUITS.

An unforseen consequence of upholding the decision below may be to reinstate jurisdiction over constitutional tort suits under *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971).

If the protection afforded disclosures of information by the CSRA is jeoparized in whole or in part by affirmance of the District Court's rationale in this case — i.e., a wall of separation exists between the Executive and Congress over protection of the nation's secrets — then the carefully fashioned CSRA remedy for constitutional torts countenanced by this Court's decision in *Bush v. Lucas, supra*, may have to be revisited.

To accept the District Court's separation of powers articulation denigrates the doctrine and the Court's longstanding recognition that Congress is ultimately the appropriate body to create remedies, especially for federal civil servants. *Carlson v. Green*, 446 U.S. at 19-20; 27-28; *Davis v. Passman*, 442 U.S. 228, 242, 245, 246-47 (1979); *Butz v. Economou*, 432 U.S. 478, 504 (1978).

The premise of *Bush v. Lucas* is the supremacy of the legislative will in matters affecting remedies for prohibited personnel practies. If that premise is undermined by affirmance of the District Court's separation of powers justification, reinstatement of the Bivens remedy may be mandated by this Court's decision in *Carlson v. Green*, 446 U.S. 14 (1980). Certainly, if the Constitution preempts the whistleblower's statutory (CSRA/MSPB) remedy for retaliatory personnel action, the courts would be hard pressed not to recognize the traditional judicial remedy.

CONCLUSION

If upheld, the decision below will open a Pandora's box of unacceptable consequences — creating a black hole that threatens to swallow the statutory protections and remedies afforded civil service whistleblowers. For these reasons, *amici* urge reversal of the District Court's decision.

Respectfully submitted,

Joseph B. Kennedy
(Counsel of Record)
Thomas M. Devine
Donald G. Aplin
Government Accountability Project
25 E Street, Suite 700
Washington, D.C. 20001
(202) 347-0460

And on Behalf of
Fund for Constitutional Government
121 Constitution Avenue, N.E.
Washington, D.C. 20002